Supreme Court, U.S.
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No. 96-991

In the

Supreme Court of the United States

October Term, 1996

CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC.; STEVEN M. BROWN; EVE BROWN; and HILLARY BROWN; and on behalf of a class of children in the State of Ohio similarly situated,

Petitioners,

vs.

BETTY D. MONTGOMERY,
Attorney General of Ohio,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Sixth Circuit has introduced a red herring into this Court's Eleventh Amendment jurisprudence. The decision below holds that the government must attempt to enforce an unconstitutional statute before an *Ex parte Young*[1] action will lie. As Petitioners have demonstrated (and Respondent does not contest), this requirement cannot be met when the suit challenges the constitutionality of an exemption. In such cases, government action is explicitly precluded by the terms of the exemption. The effect of the Sixth Circuit's decision is to unilaterally provide that any suit challenging the constitutionality of an exemption from the protection of state law (such as *Romer v. Evans*, 517 U.S. _, 116 S.Ct. 1620 (1996)) must be brought in the state courts. This result is contrary to precedent and would have far reaching implications.

As shown in the record in the district court, many lives have already been lost due to religiously based child neglect. If the federal courts are unable to act and the children are consigned to the unrealistic remedy of commencing 88 separate state court actions in Ohio alone, more lives will be lost or condemned to defect or disability. The Ohio exemption permits parents to deny their children needed medical treatment. The withdrawal of state criminal law protection from the petitioners, facially denies the constitutional rights of these children to Equal Protection and Due Process, and discriminates on the basis of religion. The federal courts must remain open to resolve these important constitutional issues.

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[1] 209 U.S. 123 (1908).

I. THE ACTION/INACTION DISTINCTION IS SPECIOUS.

Petitioners showed in their Petition for Certiorari that the action/inaction distinction for the application of *Young*, drawn by the decision below, is contrary to the decisions of this Court. No such requirement can fairly be imposed in cases where the basis for the suit is official inaction, or where the suit challenges the constitutionality of an exemption. See Pet. 19 - 20. The Respondent apparently concedes the point, because there is no attempt in the Brief in Opposition to distinguish, or even discuss *Edelman v. Jordan*, 415 U.S. 651 (1974), *Hutto v. Finney*, 437 U.S. 678 (1978), or *Quern v. Jordan*, 440 U.S. 113 (1973), which hold that a government official's inaction may be prospectively enjoined under *Young*. See also *Milliken v. Bradley*, 433 U.S. 266, 290 (1977).

More significantly, Respondent does not and cannot refute the argument that unconstitutional state action can never be demonstrated in suits involving an exemption. The exemption, by its terms, prohibits state action. The effect of the exemption is to withdraw a class of persons from the protection of the law. As in *Romer*, such laws are enforced through state inaction. State inaction is, in fact, the only lawful state response to parental endangerment of Petitioners. To impose a state action requirement upon Petitioners as a condition prerequisite to the application of *Young* is monstrous. It asks the impossible of Petitioners, and in effect, consigns their suits and all other similarly situated to the state courts. The record below establishes that the state courts have requested relief from such consignment.[2]

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[2] Mercer County, Ohio, Common Pleas Judge Dean James, pleaded for correction of the effects of this statute: "It is the hope of this Court that these types of cases will not have to be pursued by the prosecution in the remaining eighty-six counties." *State v. Miller*, slip op. 86-CRM-30,

Respondent recites *obiter dicta* from the decisions of this court in *Morales v. Trans World Airlines*, 504 U.S. 374, 381 (1992) and others. Brief in Opp., at 5 - 6. Such citations are unconvincing because the harm occurred by government official action, and not by government official inaction, as this case presents. Here the inaction clearly results in harm, by allowing and encouraging neglect of a particular group of children, and more immediately by treating these children as second-class citizens, less worthy of the state's protection. This Court has not indicated any intention to abandon the principle announced in *Edelman* that official inaction which causes harm may be enjoined under *Young*.

Respondent offers only the bare tautology that without requirements both of a connection between the state official and the statute, and action under it, "the Eleventh Amendment would offer no immunity protection to state officials such as the Attorney General." Brief in Opp., at 4. In response, it obvious that the whole point of *Young is* to withdraw immunity protection from state officials, as the only way to enforce the supremacy of the Fourteenth Amendment. The *Young* decision itself repeatedly eschews the action requirement in its analysis, stating: the official must have "some connection with the enforcement of the act, *Ex parte Young*, at 157; "[t]he fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact," *id.*, at 157; the relevant question is whether he has "any duty with regard to the enforcement of the same," *id.*, at 160; and "[h]is power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party, *id.*, at 161.

Mercer County Com. Pl., Apr. 27, 1987. (See attachment to Complaint, R. 1.)

Respondent concedes her important connection to enforcement of the criminal laws of Ohio. Brief in Opp., at 5, n.1. This concession is fatal to Respondent's position because that connection is sufficient for the invocation of the *Young* exception. It should be noted that Respondent suggests that the local prosecutors for Hamilton County and the City of Cincinnati would be "appropriate" parties under the *Young* exception.[3] Brief in Opp., at 2, 11. As the Petitioner has shown in the Petition, and Respondent has not disputed, both the Attorney General and the local prosecutors have identical concurrent authority as criminal prosecutors to enforce the challenged statutes. See Petition, at 4. Therefore, if the local prosecutors are proper parties to be enjoined under the *Young* exception, so is the Respondent.

Respondent's claim that the decision conforms to the vast majority of lower court authority is also unconvincing. The Respondent's reliance on a string of cases construing civil statutes in which the attorney general had no enforcement authority, is misplaced. See Brief in Opp., at 8 - 10. The decision below directly conflicts not only with *Young* and *Edelman*, but also with the only two court decisions holding that an attorney general is a proper *Young* defendant in a challenge to a criminal statute: *Doe v. Bolton*, 319 F.Supp. 1048 (N.D. Ga. 1970), *aff'd*, 410 U.S. 179 (1973) and *Shell Oil v. Noel*, 608 F.2d 208 (1st Cir. 1979).[4] There is no known

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[3] It should be noted as well that those two local prosecutors have a connection to only a small number of the class of petitioners, whereas the Attorney General with state-wide jurisdiction is connected to the entire class.

[4] Respondent's claim that *Shell Oil* does not support the petitioner's position is frivolous. The court stated

> "Were the Rhode Island court to apply to [the statute], the federal doctrine announced in *In re Debs*, or were it to hold that

court decision holding that a criminal prosecutor is not a proper *Young* defendant in a suit challenging a criminal statute.

In addition, Respondent does not dispute that *Steffel v. Thompson*, 415 U.S. 452 (1974) and *Perez v. Ledesma*, 401 U.S. 82 (1971) hold that the Declaratory Judgments Act was intended to relieve plaintiffs of the burden of establishing the prerequisites to injunctive relief under *Young* such as action or threat of action. The feebleness of the response is further reason why this court should grant review to correct the decision below.

II. PETITIONERS HAVE ARTICLE III STANDING.

Respondent cites the separate opinion of Justice Batchelder, which could not garner a single supporting vote, as authority for her claim that petitioners lack standing. Like the contractors in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, __U.S.__, 113 S.Ct. 2297, 2303 (1993), who

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> [the statute] gave the Attorney General *ex officio* a **right to enforce** [the statute]--a point on which we express no opinion--then it seems to us that at least the Attorney General if not the Governor would be a proper party defendant in this case." *Id.*, at 212 (emphasis added).

The court went on to state that the attorney general's relation to a criminal statute is

> "of a different order of magnitude with respect to public policy than a statute which determines the right of one person to recover from another, or sets the jurisdictional requirements for divorce, or governs the custody of a child, or enables a local authority to grant a license." *Id.*

were denied an opportunity to compete for city contracts, petitioners have asserted an injury in fact based upon their inability to compete for the state's prosecutorial resources. Respondent mischaracterizes this claim as "a right to have another person prosecuted for a crime." Brief in Opp., at 15. Petitioners assert no such right. They merely claim, as did the plaintiffs in *Romer*, that they are entitled to have an equal claim on the state's prosecutorial resources, and that they should not be arbitrarily excluded from the state's protection on the basis of religion. Respondent has offered no plausible counter to this argument.

Respondent's claim that *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973) is authority for lack of "injury in fact," is frivolous. This Court held that plaintiff in *Linda R.S.* had stated an injury in fact but not a nexus between the injury and the prosecutor's policy. Petitioners have provided a convincing record below in affidavits from an Ohio criminal prosecutor and others, that the existence of the statute encourages medical neglect among religious believers, a nexus sufficient under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The Respondent's argument that "any harm is the result of private conduct" turns a blind eye to the role the state has chosen to play by enacting the discriminatory statute.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

Dated: February 5, 1997

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